Supreme Court, U.S.
FILED
JUL 3 1 2007
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No. 06 -1589

In the
Supreme Court of the United States

Lanard Toys, Inc. and Lanard Toys, Ltd,
Petitioners,

v.

General Motors Corp. and AM General LLC,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals of the Sixth Circuit

Brief of *Amici* Malla Pollack and Other Scholars In Support of Lanard's Petition for a Writ of Certiorari

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Interest of the *Amici Curie*

The *amici* are law professors and other scholars specializing in trademark, patent, constitutional law, business, and related subjects. None of *amici* has any financial interest in the outcome of this litigation.[1] *Amici* provide their institutional affiliations for identification purposes only; they do not purport to represent the opinions or interests of their respective institutions. *Amici*'s sole interest in this case is to encourage the proper unfolding of law in their areas of specialty.

Authority to File

All parties have given permission for Pollack to file this *amicus* submission. Copies of the permission letters are attached to the proof of service submitted to the Clerk.

Summary of Argument

Amici support grant of *certiorari* without taking a position on the merits. *Amici* wish to highlight the economic importance of a clear rule regarding the limits of the functionality doctrine; this rule regulates businesses' ability to compete by manufacturing and distributing products similar to those of other market actors. The rule is still not clear despite this Court's efforts in TrafFix Devices Inc. v.

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1. No party has authored this brief in whole or in part. All costs of this *amicus* filing were paid for by Malla Pollack as part of her service obligation as a law professor.

Marketing Displays, Inc., 532 U.S. 23 (2001). In addition to its economic importance, the functionality rule performs a constitutionally required role -- preventing de facto patents from bypassing the limits of U.S. Const. Art. I, sec. 8, cl. 8. Because of the procedural posture of this case (a petition from affirmation of an erroneously granted summary judgment motion), the record is not unmanageably large yet contains sufficient facts to enable this Court to craft a realistic, workable doctrine. Furthermore, a Supreme Court opinion on this case would provide needed supervision of the federal courts' summary judgment practice regarding factually nuanced issues on which the moving party has the burden of proof.

Argument

I. Trade Dress Functionality Requires and Deserves This Court's Attention for Three Reasons

a. Courts Are In Disagreement and Discomfiture

This Court last discussed the functionality limit on trade dress protection in TrafFix Devices Inc. v. Marketing Displays, Inc., 532 U.S. 23 (2001). *TrafFix* exemplified proper judicial restraint; time has shown, however, that *TrafFix* was too sparsely written. As discussed in detail by Petitioners, the Fifth and Federal Circuits have split on *TrafFix*'s teaching regarding the relevance of available alternative designs. *Compare* Eppendorf-Netheler-Hinz GMBH v. Ritter GMBH, 289 F.3d 351, 355 (5th Cir. 2002) ("The availability of alternative designs is irrelevant" after

TrafFix) *with* Valu Engineering v. Rexnord Corp., 278 F.3d 1268, 1276 (Fed. Cir. 2002) (holding that *TrafFix* did not decide that "the availability of alternative designs cannot be a legitimate source of evidence to determine whether a feature is functional.").

The uncertainty of the functionality boundary extends beyond this specific split. The core problem may be the tension between defining utilitarian functionality as "*essential* to the use or purpose of the article," *TrafFix* at 32 (emphasis added), and "the reason the device works," *id.* at 34, especially if "the reason the device works" includes anything which "is not an arbitrary flourish in the [product's] configuration," *id. See, e.g.,* Mark Alan Thurman, The Rise and Fall of Trademark Law's Functionality Doctrine, 56 Fla. L. Rev. 243, 244-46 (2004) ("Trademark law's functionality doctrine is a mess . . ."; "[t]he Court of Appeals for the Federal Circuit concluded that TrafFix did not change the general functionality standard. . . .. Other courts, however, have read TrafFix as radically changing the law. These courts now equate functionality with utility, a standard very different from the competition-based standard in use prior to TrafFix.") (footnote omitted); Justin Pats, Comment, Conditioning Functionality: Untangling the Divergent Strands of Argument Evidenced by Recent Case Law and Commentary, 10 Marq. Intell. Prop. L. Rev. 515, 520 (2006) (reporting that after *TrafFix*, the federal circuits have used at least six different tests for functionality, and "an even wider range of interpretation" exists in cases decided by the Trademark Trials and Appeals Board and the federal district courts).

This Court should grant Lanard's petition and provide

clearer markers.

b. Clarity on Functionality Is of Great Economic Importance

In business matters, rules' clarity may be more important than their content. As this Court explained in another trademark case, "[c]ompetition is deterred, . . ., not merely by successful suit but by the plausible threat of successful suit." Wal-mart Stores v. Samara Brothers, 529 U.S. 205, 214 (2000). Potential trade dress disputes hang over multitudes of manufacturers and vendors.

Federal and state courts have issued hundreds of opinions involving trademark functionality since this Court decided *TrafFix.*[2] Three thousand seven hundred forty (3,740) trademark cases were filed in the federal district courts during the twelve months ending September 30, 2006. James C. Duff, *2006 Judicial Business of the United States Courts* at Table C-2A (2006) (presenting the annual report of the director of the Administrative Office of the U.S. Courts), *available at* <http://www.uscourts.gov/judbus2006/appendices/c2a.pdf>. These figures seem to be derived from the Civil Cover Sheet required by the United States Judicial Conference. *See* JS 44 (Rev. 11/04), *available at*

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2. Five hundred forty-four (544) documents were produced by a WESTLAW search in the ALLFEDS and ALLSTATES databases for "sy, di (function! /p (trademark "trade mark" tradedress "trade dress") & date (after March 20, 1991)" performed by Malla Pollack on July 28, 2007.

<http://www.uscourts.gov/forms/JS044.pdf>. By requesting only one "type of suit," the instructions on the reverse side of this form ensure that the statistics undercount cases filed in federal courts (as well as completely missing cases filed in state courts):

> **IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerks in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.

Id. at 2 (emphasis in original). The report, therefore, includes only a subset of filed law suits.[3] No database seems to exist listing every complaint filed in state or federal court which raises mark-like similarity between competing products under one of the multiple possible causes of action.[4]

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3. The United States Patent and Trademark Office reports the filing of two thousand eighty-six (2086) suits involving some type of trademark claim during the Office's 2006 fiscal year. USPTO, *Performance and Accountability Report Fiscal Year 2006* at Table 25 (2007), *available at* <http://www.uspto.gov/web/offices/com/annual/2006/50325_table25.html>. This number involves only suits requesting injunctions which involve registered marks. *See* 15 U.S.C. § 1116 (c) (requiring clerk of court to send separate notice to Director of USPTO for each such suit).

4. "Functionality is a universal bar to registration and a

The potential for threat is enormously greater. Despite the Information Age, physical goods remain financially important. In 2002, United States' manufacturers shipped $3,916,136,712,000 worth of products, employing 14,699,536,000 workers whose salaries totaled $576,170,541,000. To make these goods, the manufacturers required materials worth $2,025,061,815,000 (which provided employment for other workers in other businesses). U.S. Census Bureau, Dept. of Commerce, *2002 Economic Census: Manufacturing Subject Series, General Summary* at Table One (2005). The United States' economy also depends on goods manufactured elsewhere, but sold wholesale or retail inside the United States. In 2002, wholesale trade of products reached $4,634,755,112,000, U.S. Census Bureau, Dept. of Commerce, *2002 Economic Census: Wholesale Trade Subject Series, General Summary* at Table One (2005); retail trade reached $3,056,421,997,000, U.S. Census Bureau, Dept. of Commerce, *2002 Economic Census: Retail Trade Subject Series, General Summary* at Table One (2005).

Without a clear rule regarding the legal right to copy goods, any manufacturer or vendor of a recognizable product may be frightened off by a competitor. Lowered competition might be good for the threatening firm, but is counter productive for a free market economy. *See, e.g., TrafFix*, 532

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universal defense to all claims of trade identity infringement, whether they arise under a federal trademark registration, under §43(a) of the Lanham Act, or state trademark or unfair competition law." Louis Altman, Callmann on Unfair Competition, Trademarks, and Monopolies § 19:7 (4th ed.).

U.S. at 29 ("In general, unless an intellectual property right such as a patent or copyright protects an item, it will be subject to copying. . . . [C]opying is not always discouraged or disfavored by the laws which preserve our competitive economy.").

c. Functionality's Border Is A Constitutional Issue

Functionality is a rule requiring not only clarity, but accuracy. The Constitution, not just Congress and the Courts, forbids eternal patents. *See* U.S. Const., Art. I, sec. 8, cl. 8 ("limited times"). Legal rights over indicia of origin (including trade dress) exist to protect businesses' self-identification, not their inventiveness. *See* Qualitex Co. v. Jacobson Prods., 514 U.S. 159, 164 (1995) ("trademark law . . . seeks to . . . protect[] a firm's reputation"; "It is the province of patent law, not trademark law, to encourage invention . . .."). The doctrine of functionality is the wall between trade dress and patent. "If a product's functional features could be used as trademarks, . . . a monopoly over such features could be obtained without regard to whether they qualify as patents and could be extended forever (because trademarks may be renewed in perpetuity)." *Id.* at 164-65.

Such eternal quasi-patents, however, (especially without any inventiveness threshold) would be enormously valuable to their holders. Therefore, some caution that "[t]he explosion in product configuration cases" has "a lot more to do with acquiring or extending de facto patent and copyright protection through a back door than with protecting consumers from confusion." Mark Lemley, the Modern Lanham Act and the Death of Common Sense, 108 Yale L.J.

1687, 1705 (1999). Others applaud product configuration trade dress rights as essential business assets. They argue that goodwill is a key business value protected by trademark; trade dress is merely another name for the goodwill inherent in a particular product. *See* Louis Altman, Callmann on Unfair Competition, Trademarks and Monopolies § 1:11 (4th ed.) (recognizing good will in products as a valuable business asset).

As guardian of the Constitution, this Court should be vigilant to properly map the functionality border between trade dress and patent. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is" and ensure statutes be read "conformably to the constitution. . . This is of the very essence of judicial duty.").

II. This Case Is a Good Vehicle for Review

This case was decided on summary judgement. The record, therefore, will not overburden this Court. However, as discussed below, this case should not have been decided on summary judgement. The facts (which are outlined in Section III) are sufficiently developed for this Court to hone doctrine with reality.

III. This Court's Supervisory Authority Supports Grant of Certiorari

This Court does not sit merely to correct errors by other courts. It does, however, have supervisory authority over the federal courts. Dickerson v. U.S., 530 U.S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts . . .."). While not expressly separated in the petition, deciding the substantive question presented would

simultaneously clarify an important procedural point within this Court's supervisory authority: when a court may properly grant summary judgment of non-functionality for the party alleging infringement who has the burden of proof that its claimed trade dress is not functional. *See* 15 U.S.C. § 1125(a)(3) ("In a civil action for trade dress infringement under this Act for trade dress not registered on the principle register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.").[5]

On summary judgment "courts are required to view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion." Scott v. Harris, 127 S. Ct. 1769, 1774 (2007) (internal quotation marks and editing omitted). The record in this case demonstrates that neither the District Court, nor the Sixth Circuit panel, followed this guidance when granting (and affirming) summary judgment of non-functionality as to the claimed trade dress.

The record contains the following:

1. pictures of the actual and toy cars at issue, J. App. at 1115-16, 1203-04, *Lanard*, 468 F.3d; *see also* Cert. Pet. at 34a-44a;

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5. This case involves an unregistered trade dress. Plaintiffs, therefore, were statutorily required to carry the burden of proof. As to registered trade dress, registration on the principle register is merely "prima facie evidence of the validity of the registered mark . . . on or in connection with the goods . . . specified in the registration . . .." 15 U.S.C. § 1115(1). Even incontestably registered trade dress is legally vulnerable to a functionality defense. *See* 15 U.S.C. § 1115(b)(7).

2. undisputed evidence that the United States' military provided specifications on the physical characteristics of the military Humvee, AM General v. DaimlerChrysler, 311 F.3d 796, 808-09 (7th. Cir. 2002); J. App. at 1117-45, *Lanard*, 468 F.3d;
3. undisputed factual finding that the product configuration of the H2 was derived from that of the civilian Hummer (or H1) which was derived from that of the military Humvee, *Lanard*, 468 F.3d at 410-11; *see also AM General*, 311 F.3d at 808-11;
4. undisputed factual finding that the product configurations of the cars listed in item three (3) above were intended to be sufficiently similar to the military vehicle to clearly invoke the macho image of the military Humvee shown in reports about the first Iraqi War, *Lanard*, 468 F.3d at 410, 411, 417; [6] *see*

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6. The courts' mistaken conflation of different products, their sources, and any related trade dress is also reflected in the evidence relied upon to grant summary judgment that the claimed trade dress has secondary meaning. The Marylander Survey relied upon for secondary meaning steered participants away from the conclusion that the toys reflected a military vehicle used by United States forces -- even though Plaintiffs' civilian marketing campaigns were aimed at reaping the benefit of this military association. In the survey, the first question asked each participant after seeing one of Lanard's toy vehicles was: "Do you associate this toy vehicle with any make or makes of a full-size, real vehicle?" Declaration of Howard Marylander 8 (October 18, 2002), J. App. at 1213-1263, *Lanard*, 468 F.3d. "Make or makes" implies a for-profit business entity as the origin, such as G.M.; this question improperly led participants

also AM General, 311 F.3d at 808-11;

5. a description of the claimed trade dress as comprising the "exterior appearance and styling" of the "vehicles," which the Sixth Circuit interpreted to involve a shared "Hummer/ Humvee" trade dress consisting of "the exterior appearance and styling of the vehicle design which includes the grille, slanted and raised hood, split windshield, rectangular doors, squared edges, etc." (with "etc." adding nothing), *Lanard*, 468 F.3d at 415-16;
6. advertisements of the full size automobiles, *e.g.* "The H1 was built around one central philosophy: function," J. App. at 1990-94, *Lanard*, 468 F.3d;
7. Deposition of Robert J. Gula (a senior engineer for AM General) 17-18, J. App. at 898-900, *Lanard*, 468 F.3d, Cert. Pet. at 51a-52a (April 23, 2004) (which Lanard claims supports functionality) stating that "the shape [of the military Humvee] was basically a by product of a vehicle that was designed to meet a performance specification" and that "[t]he shape of the body" of the commercial Humvee "never changed" from the shape of the military Humvee;

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away from asserting that the toy reminded them most strongly of United States military vehicles. While Petitioners have chosen not to ask this Court to consider the issue of secondary meaning, this flaw in the evidence regarding secondary meaning is similar to the flaw in the analysis of functionality. Not only did the Sixth Circuit allow homogenization of trade dress in distinct products sold by different businesses, but it overlooked the extreme importance of the military origin of both the Humvee and the Hummer.

8. Declaration of Robert J. Gula (April 23, 2004), J. App. at 1264-67, *Lanard*, 468 F.3d, Cert. Pet. at 55a-57a (which plaintiffs claim disproves functionality) stating that "the Government's technical specification [for the military Humvee] did not address the exterior appearance or styling of the vehicle"; "the Government's requirements could have been met with any number of different vehicle appearances"; "the exterior appearance and styling of the vehicle is not essential to the use or purpose of the vehicle"; "other than the unique military features (such as the camouflage paint...). The civilian Hummer H1 and the military vehicle have a similar exterior design appearance. Indeed, the civilian and military vehicles are manufactured on the same assembly line with many of the same parts."

On this record, the District Court granted summary judgment dismissing "Lanard's defenses of 'functionality' and no 'secondary meaning.'" *Order Regarding Summary Judgment Motions*, General Motors v. Lanard Toys, Inc., No. 2:01-cv071103-AJT (E.D. Mich. Aug. 27, 2004). The Sixth Circuit affirmed, stating that: "the plain appearance of the vehicle shows that the elements which comprise its trade dress are inherently non-functional." *Lanard*, 468 F.3d at 417.

What is missing from the Sixth Circuit's opinion is any explanation of why it concluded that *no* reasonable trier of fact could discern the lingering affect of the military's *functional* specifications on Plaintiffs' claimed trade dress. Plaintiffs agree that their trade dress reflects their cars' military linage. Plaintiffs do not dispute that the military specifications are functional. Plaintiffs provided no evidence tracing the military specifications' impact on the vehicles'

external configuration. But absent such evidence, a reasonable trier of fact would not be forced to conclude that Plaintiffs had met their burden of proving the civilian trade dress was unaffected by the military specifications.

Whatever the correct standard, whatever the correct method of analysis, lack of functionality should not have been decided on summary judgment in light of this record -- unless, of course, the Sixth Circuit is correct that a judge is allowed to look at a complex, functional product (such as an automobile) and decide on looks alone that all aspects of the product's configuration are "inherently not functional" -- an amazing assertion[7] made even more interesting by its echo of inherently distinctive product configurations, a classification this Court has correctly rejected. *See* Wal-mart v. Samara Brothers, 529 U.S. 205, 212-13 (2000).

The most telling omission from the Sixth Circuit's discussion at this point is the absence of analysis of the "split windscreen." A trier of fact might reasonably assume (absent contrary evidence), that a split windscreen is less at risk from impacts; one side might shatter without breaking the other. Why is impact resistance not a "functional" aspect of windscreens, especially those designed for military use (where presumably bullets might impact the windscreen)? *See* Cert. Pet. at 7-9 (explaining functionality of numerous

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7. "It is sometimes difficult to draw a sharp line between functional and non-functional features. For this reason, the Patent & Trademark Office has on occasion required an applicant for registration of a trade dress to specify exactly what features have trademark significance; i.e., to write "patent claims" in a trademark application. Callmann on Unfair Competition, *supra* note 4, at § 19:8 (footnotes omitted).

aspects of trade dress).

This Court, therefore, would benefit the federal courts by clarifying judges' limited power at summary judgment to recognize trade dress non-functionality when they see it.[8]

Conclusion

For the reasons discussed above, this Court should grant a writ of certiorari regardless of the Court's view on the merits of petitioner's claim.

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8. The trade-offs between strength (from different angles of attack), weather resistance, weight support, speed, carrying capacity, ease of exit, cost, and beauty are not as clear to a legally trained eye as the presence of danger in the videotape of a car chase. *Compare* Scott v. Harris , No. 05-1631 (U.S. April 30, 2007) (relying on Justices' own viewing of videotape for grant of summary judgement on qualified immunity).

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